(2)

No. 06-219

Supreme Court, U.S.
OCT 25 2006
CLERK

IN THE

Supreme Court of the United States

Charles Wilkie et al.,

Petitioners,

v.

Harvey Frank Robbins

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether government officials can be guilty under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 et seq., of the predicate act of extortion under color of official right when they engage in otherwise lawful actions with an intent to extort a right-of-way from a private citizen for the benefit of the government, rather than with an intent to merely carry out their regulatory duties, and if so whether that statutory prohibition was clearly established under the facts of this case.

2. Whether respondent's *Bivens* claim based on the exercise of his Fifth Amendment rights is precluded by the availability of judicial review under the Administrative Procedure Act, 5 U.S.C. 701 et seq., or other statutes for the kind of administrative actions on which his claim is based.

3. Whether the Fifth Amendment protects against retaliation for exercising a "right to exclude" the government from one's property outside the eminent domain process and, if so, whether that Fifth Amendment right was clearly established under the facts of this case.

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STATEMENT OF THE CASE

Petitioners seek certiorari to review an interlocutory order addressing what they describe as novel questions of law arising from an unusual dispute over easements on federal and private lands.

1. Respondent Harvey Frank Robbins is the owner of the High Island Ranch, a cattle and guest ranch in Hot Springs County, Wyoming. Pet. App. 2a. From 1987 through 1994, the United States Bureau of Land Management (BLM) sought to acquire the ranch, or at least an easement across it, apparently to secure public access to the nearby Shoshone National Forest. Appellee's Supplemental App. at 574-609, *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006) (hereinafter Appellee's Supplemental App.). During that time, the ranch was owned by respondent's predecessor-in-interest, George Nelson. Petitioners, employees of the BLM, persuaded Nelson to grant the Government a road easement in 1994. Pet. App. 2a. The easement was a long-term property interest, allowing the BLM to use and maintain the road both for its own use and for the use of its assigns. Appellee's Supplemental App. 619-20.

In exchange for the easement, the BLM granted Nelson a more limited right-of-way to use the same road as it passed over federal property. Appellee's Supplemental App. 634. Unlike the easement, the right-of-way required Nelson to pay the BLM a "fair market value rental," *id.*, and limited Nelson's use and maintenance of the road, *id.* at 634-36. For example, while the easement given to the BLM allowed the Government to permit mining companies to use the road to reach federal land, the right of way did not permit Nelson to use the road for that purpose. *Id.* at 636. Nelson timely recorded his right-of-way, but for reasons undisclosed in the record, the BLM failed to record its easement. Pet. App. 2a.

Unaware of the unrecorded easement, respondent purchased the property and recorded the warranty deed, thereby extinguishing the BLM's unrecorded easement. *Id.* at

2a. Upon learning of their mistake, petitioners demanded that respondent give them the easement without compensation and when he refused, they commenced a campaign of threats, harassment and intimidation designed to coerce him into relinquishing his right to exclude the Government from his private property. *Id.* at 2a-3a. Among other things, petitioners brought unfounded criminal charges against respondent, trespassed on his property, cancelled his special recreation use permit and grazing privileges, interfered with his guest cattle drives, refused to maintain the road providing access to his property, and threatened to cancel, and then did cancel, his right-of-way across federal lands. *Id.* at 3a. The net result was the complete destruction of respondent's business.

The purpose of these actions was clear. Former BLM range conservationist Edward Parodi testified that petitioner Leone boasted to him and to other BLM employees on a "daily" basis that he wanted to "get [Robbins's] permits and get him out of business" and that this hostile attitude was shared by other petitioners. Appellee's Supplemental App. 165-166. Parodi also testified that "the attitude just got worse and worse and worse towards Mr. Robbins, and pretty soon I was being asked to do things that I . . . shouldn't have been authorized to do." *Id.* at 163. Parodi eventually resigned and later explained that "I didn't think I could do the job any longer . . . . It's one thing to go after somebody that is willfully busting the regulations and going out of their way to get something out of the government. I only saw Mr. Robbins as a man standing up for his rights for his property." *Id.* at 173-74, 242.

2. After enduring many years of abuse, respondent sued petitioners in their individual capacities. Among other things, respondent alleged that petitioners had engaged in a pattern of extortion and blackmail in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Respondent also sought relief pursuant to

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), for violations of his Fifth Amendment right to exclude the Government from his property in the absence of a proper taking and just compensation. Pet. App. 1a-2a.[1]

The district court initially granted petitioners' motion to dismiss on the grounds that respondent had failed to plead damages under RICO, and that his *Bivens* claim was precluded by the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706 (2006), and the Federal Tort Claims Act (FTCA). *Id.* at 3a. On appeal, the Tenth Circuit reversed. *Id.* at 76a-84a. It held that respondent adequately pled a variety of damages in his RICO count. *Id.* at 79a-80a. The court further held that neither the APA nor the FTCA precluded his *Bivens* claim. *Id.* at 83a-84a. The court agreed with petitioners that if respondent "attempted to hold Defendants liable for alleged constitutional violations committed while reaching a final agency decision, a *Bivens* action would not be available." *Id.* at 81a (citation omitted). However, the court rejected the assertion that the APA precluded respondent's Fifth Amendment claim entirely. The court noted that "the APA contains no remedy whatsoever for constitutional violations committed by individual federal employees unrelated to final agency action." *Id.* at 81a-82a. In this case, the court held, "several of Appellant's allegations of Defendants' intentional misconduct are unrelated to any final agency action and are therefore properly within the scope of a *Bivens* claim." *Id.* at 82a. The court did not, however, determine which allegations were precluded and which could go forward, leaving that task for the district court. *See id.* at 25a-26a.

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[1] Respondent also claimed additional violations of his rights under the Fourth, Fifth, and Fourteenth Amendments, but those claims are not at issue here. Pet. App. 3a-4a.

On remand, petitioners did not ask the district court to decide which of respondent's allegations on the Fifth Amendment count were precluded by the APA. *Id.* at 26a. Instead, petitioners moved to dismiss on qualified immunity grounds. *Id.* at 55a. The district court denied the motion in relevant part, holding that the complaint adequately pled violations of clearly established rights under RICO and the Fifth Amendment. *Id.* at 58a-62a, 72a-74a. Petitioners did not appeal. Instead, petitioners engaged in discovery, *see id.* at 38a, and nine months later, moved for summary judgment, re-asserting their defense of qualified immunity, *id.* at 33a. The district court denied the motion, concluding that respondent had substantiated the allegations in his complaint. *Id.* at 48a. Faced then with the same facts as it had assumed in ruling on the motion to dismiss, the district court held that its earlier legal determination – that the rights violated were "clearly established" – was law of the case and denied the motion for summary judgment. *Id.* at 36a-39a.

3. Petitioners appealed again, and the Tenth Circuit affirmed. *Id.* at 26a. The court first recognized the "Fifth Amendment right to exclude the government from one's private property" as "'a fundamental element of the property right.'" *Id.* at 12a (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979)). The court concluded that "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a. "Thus, Robbins has a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power." *Id.* at 14a. The court further concluded that petitioners' actions in this case violated that clearly established constitutional right: "If we permit government officials to retaliate against citizens who chose to exercise this right, citizens will be less likely to exclude the government and government officials will be more inclined to obtain private property by means outside the Takings Clause.

The constitutional right to just compensation, in turn, would become meaningless." *Id.* at 14a-15a.

The court also rejected petitioners' assertion of qualified immunity to respondent's RICO claims. The court noted that petitioners "do not contest" that respondent "sufficiently alleged Defendants engaged in a pattern of racketeering involving extortion in violation of clearly established law under RICO, the Hobbs Act, and Wyo. Stat. Ann. § 6-2-402." *Id.* at 17a. Instead, petitioners argued that "[b]ecause [they] had legal authority to require Robbins to grant the BLM a right-of-way in exchange for his right-of-way on federal lands, . . . their conduct in seeking the right-of-way does not constitute a clearly established predicate act under either the Hobbs Act or Wyoming law." *Id.* The court rejected this assertion as based on a fundamental mischaracterization of respondent's claim:

> Robbins does not allege that Defendants committed extortion by attempting to obtain a right-of-way. Rather, he alleges Defendants' other actions, including refusing to maintain the road providing access to Robbins' property, cancelling Robbins' special recreation use permit and grazing privileges, bringing unfounded criminal charges against Robbins, trespassing on Robbins' private property, and interfering with Robbins' guest cattle drives, were all committed in an attempt to coerce Robbins into granting BLM a right-of-way.

Id. The court noted that although petitioners claimed generally that all of their conduct was within their lawful regulatory authority, they did "not enumerate specific regulatory provisions permitting each of their actions." *Id.* The court explained that even if petitioners had a general legal right to require respondent to provide an easement in exchange for his right-of-way across federal land, they could not achieve that lawful end through the unlawful means of extortion. *Id.* at 18a-20a. The court then rejected petitioners'

claim that their conduct was not extortionate, but simply aggressive exercise of their lawful regulatory authority. That claim, the court held, depended on disputed questions of fact that could not be resolved on summary judgment. *Id.* at 21a. The court also held that petitioners' conduct independently violated Wyoming's extortion statute. *Id.* at 22a-25a.

Finally, the court rejected petitioners' argument that the APA precluded respondent's *Bivens* claim. The Court noted its prior holding in the first appeal that the APA precluded respondent's Fifth Amendment claim only to the extent it was based on "individual action leading to a final agency decision." *Id.* at 25a. The court then declined petitioners' request that it "determine which allegations remain and which are precluded," explaining that "Defendants did not raise this issue in their motion for summary judgment." *Id.* at 25a-26a.

REASONS FOR DENYING THE WRIT

Petitioners seek review of an interlocutory decision addressing legal questions that, by their own acknowledgment, rarely arise in the normal operation of the Government's land management programs. Petitioners do not assert that the court of appeals's decision gives rise to any significant, much less sustained, conflict among the circuits. And, in fact, even the shallow division of authority they allege is illusory. Rather than deciding any broad question of general legal significance, the decision below narrowly addressed the peculiar facts of this unusual case and reached a result which, while plainly correct, will have no broader or recurring significance. Indeed, nothing in the decision threatens the legitimate regulatory authority of federal land management officials who have long managed to resolve disputes with local landowners without resort to the tactics employed in this case. Finally, even if the court of appeals's holdings were worthy of this Court's review, the current interlocutory posture of this case makes review at this time inadvisable, raising substantial jurisdictional impediments

that could preclude this Court from ever reaching at least one of the questions presented. The petition should be denied.

I. The Tenth Circuit's Interlocutory Ruling On Respondent's RICO Claim Does Not Warrant Review By This Court.

Petitioners first ask this Court to decide whether a plaintiff may state a claim under RICO by alleging that "government officials, whose actions were authorized by law, had an extortionate intent to obtain property for the sole benefit of the government." Pet. 13. That question is not the basis of any circuit conflict and, in any event, does not actually arise on the facts of this case. Moreover, the decision below is correct, simply applying the settled principle that the abuse of otherwise lawful authority for extortionate purposes violates the Hobbs Act and RICO.

A. The Decision Below Implicates No Division Of Authority.

Petitioners assert that the decision below conflicts with one decision of one other court of appeals, *Sinclair v. Hawke*, 314 F.3d 934 (8th Cir. 2003). *See* Pet. 15-16. That assertion is incorrect and, even if it were not, review of such a nascent and shallow split would be premature at this time.

In *Sinclair*, federal bank regulators took escalating action against a bank, ultimately declaring the bank insolvent and appointing a statutory receiver. 314 F.3d at 937-38. The bank brought a civil RICO claim, alleging that the regulators conspired to use their authority to "prevent minority and low-income borrowers from having access to credit." *Id.* at 939. The Eighth Circuit held that this did not state a violation of RICO because "Mr. Sinclair has cited no authority for the proposition that federal employees who take regulatory action consistent with their statutory powers engaged in a 'pattern of racketeering activity' if those actions are adverse to a particular industry or business activity." *Id.* at 943.

That conclusion was both correct and entirely inapplicable to this case. As the Eighth Circuit observed, "regulators do not become racketeers by acting like aggressive regulators." *Sinclair*, 314 F.3d at 944. Instead, RICO requires proof that the challenged conduct actually violated one of a list of predicate statutes, such as the Hobbs Act. 18 U.S.C. § 1961(1) (2006). Although the plaintiff in *Sinclair* alleged that the defendants' conduct was unfair, and potentially discriminatory, it did not allege that the regulators had engaged in "murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance," or any other RICO predicate act. *Id.* At most, the plaintiff alleged a form of racial discrimination, but discrimination is not an act of racketeering. *Id.* By contrast, in this case the Tenth Circuit concluded that the defendants' conduct violated two RICO predicate statutes, the Hobbs Act and Wyoming's extortion statute. Pet. App. 18a-25a. Although petitioners dispute that their conduct violated the Hobbs Act properly construed, *Sinclair* has nothing to say on that question.

In addition, even if *Sinclair* were read to announce a general rule regarding all RICO claims against government regulators, that rule is plainly restricted to cases in which the defendants' conduct was "consistent with their statutory powers." 314 F.3d at 943. But in this case, the Tenth Circuit held that petitioners would be subject to liability only if they were *not* acting to "carry out their regulatory duties" in filing false criminal charges against respondent, trespassing on his property, and engaging in the various other extortionate acts that form the basis of liability in this case. Pet. App. 18a. *See also infra* 9-11.

Petitioners cannot plausibly claim that any disagreement between the Tenth and Eight Circuits is sufficiently clear and entrenched as to warrant review by this Court at this time. That only two circuits have even arguably weighed in on the question presented is good reason to doubt that the issue is of

recurring importance. Moreover, to the extent the question is sufficiently important to warrant this Court's review at some point, that review could be considerably assisted by awaiting the views of other courts of appeals and clarification of the scope of the rules adopted by the Eighth and Tenth Circuits.

B. This Case Is A Poor Vehicle For Resolving Any Questions Regarding RICO's Application To The Conduct Of Government Regulators.

Even if petitioners had presented this Court with a question worthy of review, this case presents a particularly poor vehicle for deciding it.

1. Resolving the RICO question petitioners present – *i.e.*, whether government officials "acting pursuant to their regulatory authority" can be held liable for engaging in extortion under color of law under the Hobbs Act, Pet. (I) – will have no effect on the actual disposition of this case. Although the court of appeals assumed for the sake of its decision that petitioners' conduct was authorized in some general sense, the bulk of the challenged conduct was plainly outside the scope of any conceivable authority petitioners may have had. As a result, even if this Court determined that the Hobbs Act applied only to extortionate conduct outside an official's "regulatory authority," petitioners still would not be entitled to qualified immunity.

Petitioners argue that the "basic regulatory activity giving rise to this case" was the lawful act of "attempting to secure a reciprocal right-of-way over private land intermingled with public lands." Pet. 10. But as the Tenth Circuit noted, "Defendants . . . apparently misunderstand Robbins' allegations." Pet. App. 17a. The court of appeals concluded that respondent's claim does not, for example, depend on

petitioners' enforcement of 43 C.F.R. § 2800.0-2[2] to deny his application for a federal right-of-way.[3] Pet. App. 17a. The extortion in this case arises principally from the *other* actions petitioners took – actions *not* authorized by the regulations or any other source of law, such as filing false criminal charges, trespassing on respondent's land, canceling his special use and grazing permits on false pretenses, etc. *See* Pet. App. 17a. Petitioners cannot plausibly claim that such conduct was authorized by their employer as part of the "give and take" of federal land use negotiations. Pet. 11.[4] Indeed, many of

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[2] Unless otherwise indicated, citations to the regulations in this brief refer to the version in effect at the time of the events at issue in this case.

[3] That said, petitioners' revocation of, and subsequent refusal to reinstate, respondent's right-of-way across federal land was *not* authorized. As it stood at the time, the regulation stated that BLM could condition the grant of a federal right-of-way upon the applicant's "grant to the United States [of] an *equivalent* right-of-way that is adequate in duration and rights." 43 C.F.R. § 2801.1-2 (1980) (emphasis added). Contrary to the regulation, the easement petitioners demanded from respondent was not the "equivalent" of the right-of-way that they offered to him. For example, the right of way offered to respondent required annual rental payments while the easement demanded from respondent did not. Appellee's Supplemental App. at 619-620, 633-636. Moreover, the easement demanded by petitioners had only a few minor restrictions, while the right-of-way offered to respondent included several pages of limitations regarding the use and maintenance of the road. *Id.* Thus, while BLM licensees could use the road for mineral extraction purposes, respondent could not. *Id.*

[4] For example, the grazing permit regulations specified a single approved method of securing access to private land under that program – the agency may include the access requirement as part of the grazing lease. 43 C.F.R. 4130.3-2(h). Nothing in the regulations purports to authorize officials to seek an easement through the extortionate methods employed in this case. Moreover, nothing in the regulations permits BLM officials to demand a long-term ease-

petitioners' actions were independently unlawful (*e.g.*, filing false criminal charges and trespassing). Those unauthorized acts are more than a sufficient predicate for respondent's Hobbs Act and RICO claims in this case.

2. Deciding the first question presented will fail to resolve the RICO claim for another reason as well. In addition to holding that petitioners' conduct constituted extortion "under color of official right" under the Hobbs Act, the Tenth Circuit separately held that petitioners conduct violated the Wyoming extortion statute. Pet. App. 22a-25a. The violation of the state statute is an independent and sufficient predicate for respondent's RICO claim. *See* 18 U.S.C. § 1961(1). Petitioners do not, however, seek review of the Tenth Circuit's construction of state law. *See* Pet. (I) (challenging only whether conduct constituted "the predicate act of extortion under color of official right").[5] Nor is that issue worthy of this Court's review. Consequently, even if this Court were to hold in petitioners' favor on the question they present, respondent's RICO claim would still proceed.

3. Finally, as the Solicitor General frequently reminds the Court, "[t]he interlocutory nature of the ruling provides a sufficient basis to deny review." Brief for the Equal Employment Opportunity Comm'n in Opposition at 6, *Sidley Austin LLP v. EEOC*, No. 05-1481 (July 2006).[6] This Court

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ment over the *entirety* of the roadway across respondent's land as a condition of receiving a temporary license to graze cattle on *some* parcels of federal land. *See* 43 C.F.R. §§ 4130.2(d), 4130.3-2(h). Indeed, any such overreaching regulations would be unconstitutional. *See Dollan v. City of Tigard*, 512 U.S. 374, 386-396 (1994).

[5] Although the Question Presented does not cite the Hobbs Act, the phrase "under color of official right" is taken directly from that Act's definition of "extortion," *see* 18 U.S.C. § 1951(b)(2) , and is not used in the Wyoming extortion statute, *see* Wyo. Stat. Ann. § 6-2-402(a).

[6] *See also, e.g.*, Brief for the Respondents in Opposition at 11, *Hamdan v. Rumsfeld*, 543 U.S. 1096 (2004) (No. 04-702); Brief for

"generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of petition for writ of certiorari). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916).

The Solicitor General offers no compelling reason for departing from his normal position in this case. The RICO question depends on the assumption that petitioners engaged in extortionate conduct that was within their regulatory authority. That assumption may well be disproved in further proceedings and, at the very least, the question is best resolved on the basis of a fully developed factual record rather than on the court of appeals's assumption.

The same is true of the other questions presented as well. As shall be described below, the scope of the court of appeals's holdings on respondent's *Bivens* claim depends on what conduct the lower courts ultimately determine to be "unrelated to any final agency action." Pet. App. 82a. *See infra* 17-19. Waiting for final judgment will also avoid jurisdictional barriers to this Court's review of that holding. *See id.* Finally, the need to decide *any* of these issues may be mooted before final judgment if, for example, petitioners' view of the facts of the case prevails at trial.

C. The Tenth Circuit's Decision Is Correct.

This Court's review is also unnecessary because the decision below was correct.

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the United States in Opposition at 8, *Alameida v. Mayweathers*, 540 U.S. 815 (2003) (No. 02-1655); Brief for the Respondent in Opposition at 7-8, *Romano v. SEC*, 526 U.S. 1111 (1998) (No. 98-1271); Brief for the United States in Opposition at 5, *Fleet Factors Corp. v. United States*, 498 U.S. 1046 (1990) (No. 90-504).

1. The Hobbs Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Nothing in this definition precludes an extortion claim against a government official simply because the abuse of government authority was the means of the extortion. To the contrary, the wrongful use of otherwise lawful governmental authority is at the historical heart of the common law crime of extortion and remains actionable under the Hobbs Act today. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) (discussing common law origins of extortion). Indeed, this Court and others have repeatedly affirmed Hobbs Act convictions where the defendant misused official authority to commit extortion. For example, in *Evans v. United States*, 504 U.S. 255 (1992), a county commissioner committed extortion by implicitly promising to vote for a rezoning application in exchange for cash. Voting in favor of the proposal was indisputably within the commissioner's lawful authority, in the same way that some of petitioners' extortionate conduct may have involved acts within their lawful authority in this case. However, like petitioners here, the commissioner in *Evans* exercised his lawful authority for an unlawful purpose and thereby ran afoul of the Hobbs Act. Indeed, that is the essence of extortion "under color of official right." *See, e.g., United States v. Gillock*, 445 U.S. 360 (1980) (state senator blocked extradition of a defendant and agreed to introduce legislation in order to obtain cash payments); *United States v. Foster*, 443 F.3d 978 (8th Cir. 2006) (city aldermen agreed to vote in favor a construction project in order to obtain cash payments), *cert. denied*, No. 06-5964, 2006 WL 2400928 (Oct. 2, 2006); *United States v. Swift*, 732 F.2d 878, 879 (11th Cir. 1984) (city official who "had authority" to approve payment requests violated the Hobbs Act when he facilitated approvals in order to obtain money from a construction company); *United States v.*

Jannotti, 673 F.2d 578 (3d Cir. 1982) (city councilmen sought approval for hotel projects in order to obtain money from undercover agents posing as foreign investors); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979) (state transportation officials leased equipment from a private company in order to obtain campaign contributions from that company).

A different question might be presented if petitioners could show either that federal law *required* them to take the actions that they did, or that federal law permitted them to engage in the challenged conduct for the purpose of extorting an easement. But the most petitioners can say in this case is that their *end* may have been lawful (*i.e.*, securing an easement), and that *some of the means* employed would have been within their lawful authority if used for a lawful purpose (*e.g.*, revoking grazing permits for genuine violations of the grazing rules). But petitioners cannot reasonably claim that anything in federal law either permitted or required them to file false criminal charges, trespass on respondent's land, and the like, in order to extort an easement from him. As the Tenth Circuit recognized, even if petitioners may have had a right to an easement, they did not have the right to obtain that easement through extortion. Pet. App. 18a-20a (noting uniform rejection of "claim of right" defense to extortion outside context of labor disputes). *See also, e.g.*, *United States v. Castor*, 937 F.2d 293, 299 (7th Cir. 1991); *United States v. Zappola*, 677 F.2d 264, 269-270 (2d Cir. 1982); *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979); *United States v. Warledo*, 557 F.2d 721, 729-30 (10th Cir. 1977).

Nor is petitioners' extortionate conduct excused simply because they sought property for the government rather than themselves. Fifty years ago, this Court held that "extortion as defined in the [the Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States v. Green*, 350 U.S. 415, 420 (1956). The courts thus regularly apply the Hobbs Act to

extortion undertaken for the benefit of a third party.[7] This is true even when the defendant is a government official seeking to benefit another through the abuse of otherwise lawful authority.[8]

Acknowledging that it "is not always necessary that the defendant himself benefit from the extortion," petitioners seek to distinguish this case by proposing an exception to the rule: it is not extortion if the third-party recipient is the government. Pet. 13-14. Nothing in the language of the statute supports this exception, nor do petitioners cite any case adopting their revision of the Act. To the contrary, courts have recognized that "gravamen of the offense is loss to the victim," *United States v. Frazier*, 560 F.2d. 884, 887 (1977), not the identity of the beneficiary. *See* 18 U.S.C. § 1951(b)(2) (defining extortion without reference to the purpose or beneficiary of the extortion).

Accordingly, this Court and others have applied the concept of extortion to attempts to obtain property for the benefit of the government in a number of similar contexts. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (where Coastal Commission required public easement as condition of approval for a rebuilding permit,

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[7] *See, e.g., United States v. Panaro*, 266 F.3d 939, 948 (9th Cir. 2001); *United States v. Clemente*, 640 F.2d 1069, 1097-1080 (2d Cir. 1981); *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977).

[8] *See, e.g., United States v. Hairston*, 46 F.3d 361, 365 (4th Cir. 1995) (city aldermen extorted contributions for a charity run by aldermen); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (public officials extorted money for political allies); *United States v. Scacchetti*, 668 F.2d 643 (2d Cir. 1982) (city judge extorted automobile services for his friend); *United States v. Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979) (state transportation officials extorted money for their political party); *United States v. Trotta*, 525 F.2d 1096 (2d Cir. 1975) (town commissioner extorted money for the local political committee).

holding that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion'") (citation omitted); *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (same); *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995) (rejecting qualified immunity claim where defendant denied excavation permit to plaintiffs because they refused to give the city a portion of their land, reasoning that the defendant "could not have believed . . . that he had discretion to deny an excavation permit to [plaintiffs] as a means of extorting land from them").

Petitioners may believe that the failure to explicitly exclude extortion on behalf of the government is a defect in the RICO statute. But that "defect – if defect it is – is inherent in the statute as written, . . . [and] its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Sedima SPRL v. Imrex Co.*, 473 U.S. 479, 499-500 (1985).

2. Whether petitioners' obligations under the Hobbs Act were clearly established when the conduct in this case took place is not a question of general importance worthy of this Court's review. Petitioners do not assert that there is any circuit conflict over that question and, in any event, the Tenth Circuit's decision was correct. On qualified immunity, the relevant question is whether "in the light of preexisting law the unlawfulness [is] apparent." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Here, each component of petitioners' unlawful extortion is well-established by prior precedent. This Court and numerous courts of appeal have affirmed Hobbs Act Convictions of officials who took otherwise lawful acts to extort property from citizens and have held that personal interest need not exist to find a Hobbs Act violation. *See supra* 13-15. That no other case has confronted a situation precisely like this one is a testament to the unusual and egregious nature of petitioners' conduct, not to any

uncertainty in the law. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

II. The Tenth Circuit's *Bivens* Holding Does Not Warrant Review By This Court.

Petitioners next ask this Court to decide whether the APA precludes a *Bivens* cause of action in the factual context of this case. This Court lacks jurisdiction to decide that question. At the same time, even if this Court had jurisdiction to consider the question, there is no reason to exercise it in this case. Petitioners fail to identify any real division among the courts of appeals on the question they present and the decision below is, in fact, correct.

A. This Court Lacks Jurisdiction To Consider The Second Question Presented.

Appeals from denial of qualified immunity claims fall within a narrow exception to the normal jurisdictional bar against appellate review of non-final orders. *See, e.g.*, *Johnson v. Jones*, 515 U.S. 304, 309-12 (1995). Whether a *Bivens* cause of action is available in this case falls outside that limited jurisdiction because it does not go to petitioners' entitlement to qualified immunity, and because petitioners raised precisely the same objection in a prior qualified immunity appeal.

1. A qualified immunity appeal is strictly limited to a single "question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Accordingly, although a district court may simultaneously resolve other questions when the defense is raised, the only question on appeal is whether the defendant's conduct violated clearly established law. *See, e.g.*, *Johnson*, 515 U.S. at 313. Petitioners' argument that the APA pre-empts the *Bivens* cause of action is plainly distinct from the question whether their conduct violated clearly established law. Indeed, the two legal inquiries share virtually nothing in

common, the qualified immunity question turning on the nature of the underlying constitutional right and the *Bivens* pre-emption question turning on Congress's intent to provide an exclusive statutory means for enforcing that right. *Compare Mitchell*, 472 U.S. at 528, *with Davis v. Passman*, 442 U.S. 228, 246-47 (1979).

Petitioners argue that the pre-emption issue is nonetheless reviewable because it is "inextricably intertwined" with the qualified immunity question. Pet. 20. But this Court has previously rejected the assertion that appellate courts have broad "pendent appellate jurisdiction" in qualified immunity appeals. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-51 (1995). Petitioners' citation to a footnote in *Hartman v. Moore*, 126 S. Ct. 1695, 1702 n.5 (2006), establishes nothing to the contrary. Pet. 21. In that case, this Court considered whether lack of probable cause for a prosecution was a necessary element of a First Amendment retaliatory prosecution claim. *Hartman*, 126 S. Ct. at 1701. The Court rejected the suggestion that the question went beyond the scope of a proper qualified immunity appeal, explaining that the "definition of an element of the tort [] directly implicated . . . the defense of qualified immunity." *Id.* at 1702 n.5. By contrast, a *Bivens* pre-emption claim goes to the existence of a cause of action and not to the definition of the underlying constitutional violation. The *only* thing the qualified immunity and *Bivens* pre-emption claims have in common is that they are "threshold argument[s]," Pet. 20, that would provide a complete defense if proven. But that could be said of any number of affirmative defenses (*e.g.*, statute of limitations, waiver, etc.), none of which is subject to interlocutory review.

2. Even if this Court might otherwise have jurisdiction to review a *Bivens* pre-emption question on an interlocutory appeal, that jurisdiction is not available in this case because petitioners previously raised the same claim, under precisely

the same facts, in a prior appeal to the Tenth Circuit. *See* Pet. App. 80a-84a.

Contrary to petitioners' assertion, *Behrens v. Pelletier*, 516 U.S. 299 (1996), does not allow a second interlocutory appeal when nothing of relevance has changed between the motion to dismiss and the motion for summary judgment. In *Behrens*, this Court held that "resolution of the immunity question may 'require more than one judiciously timed appeal,' because the legally relevant factors bearing upon the [immunity] question will be different on summary judgment than on an earlier motion to dismiss." *Id.* at 309. In this case, however, "the legally relevant factors" have not changed between the motions to dismiss and for summary judgment. The question upon which petitioners seek review is a pure question of law and, in any event, the district court concluded that the evidence substantiated the allegations in the complaint, leaving the court with the same factual predicate on summary judgment as it had assumed on the motion to dismiss. Pet. App. 37a-39a. In such circumstances, a second appeal serves no purpose, as there is no reason to think that the court of appeals will not find the issue governed by law of the case or simply adhere to its prior decision as binding circuit precedent. *See Kimberlin v. Quinlan*, 199 F.3d 496, 501 (D.C. Cir. 1999) (applying law of the case to second qualified immunity appeal). Accordingly, where the law and facts have not changed between the motion to dismiss and motion for summary judgment, the district court's decision is not "'too important to be denied review,' as [the Court's] finality jurisprudence requires." *Behrens*, 516 U.S. at 308 (internal citation omitted).

B. There Is No Division Among The Circuits Regarding The APA's Preclusion Of *Bivens* Claims.

Even if this Court had jurisdiction to consider petitioners' *Bivens* pre-emption argument, the issue is unworthy of this Court's review.

Petitioners' assertion of a circuit split on the question is meritless. The Tenth Circuit held that the APA does not preclude a *Bivens* suit against individual BLM officials for "intentional misconduct . . . unrelated to any final agency action." Pet. App. 82a. No other circuit has held to the contrary. To be sure, some courts have said that the APA may preclude a *Bivens* action in appropriate circumstances even though "the scope of the two remedies may not be entirely coextensive." Pet. 18. But those statements have no relevance in this case, as the APA *does not even apply* to the challenged conduct here because it is "unrelated to any final agency action." Pet. App. 82a. In each of the decisions cited by petitioners, the defendant's actions were indisputably "related" to final agency action and were, in fact, actually subject to review under the APA.[9] The only question in

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[9] In *Sinclair v. Hawke*, 314 F.3d 934, 942 (8th Cir. 2003), the regulatory actions of the Office of the Controller of the Currency "were subject to administrative and judicial review processes that [plaintiff] invoked." In *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1908, the USDA inspectors' reports of food safety violations were actually under administrative appeal when the *Bivens* claim was made. See *Nebraska Beef, Ltd. v. Greening*, 2004 WL 546900, at *3 (D. Neb. 2004), *rev'd* 398 F.3d 1080. In *Miller v. United States Dep't of Agriculture*, 143 F.3d 1413, 1416 (11th Cir. 1998), the plaintiff's dismissal from his position as County Executive Director of the Agriculture Stabilization and Conservation Service "constitute[d] a final order," which the plaintiff was entitled to challenge by "bring[ing] suit in federal court for relief." And under nearly identically facts in *Moore v. Glickman*, "the APA provide[d] [plaintiff] with judicial

those cases, therefore, was whether the plaintiff was entitled to the *additional* remedy of a *Bivens* claim for compensatory damages. In this case, however, the question is whether the existence of an inapplicable statute precludes respondent from seeking any relief at all for serious constitutional violations. On that question, the cases cited by petitioners have nothing to say.

In addition, the circuit authority is inapposite because it does not deal with the regulatory regime at issue in this case. None of the cases cited by petitioners hold that existence of APA review is in itself sufficient to preclude a *Bivens* action. *See, e.g., Moore*, 113 F.3d at 994 ("Moore is correct that judicial review of her claim under the APA does not automatically preclude her *Bivens* claim."). Instead, each decision held that the APA provided an exclusive remedy in the case before the court because of the comprehensive regulatory regime applicable in that case.[10] None of the cases examined whether the regulatory regime governing federal land management is sufficiently comprehensive as to indicate Congress's intent to displace a *Bivens* remedy, the essential question here.

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review of her termination." 113 F.3d 988, 993 (9th Cir. 1997). Finally, in *Sky Ad, Inc. v. McClure* 951 F.2d 1146, 1148 (9th Cir. 1991), plaintiff complained of an FAA rule, and thus could seek judicial review because of "Congress' authorization in the APA for courts of appeals to set aside unconstitutional rulemaking."

[10] *See, e.g., Sinclair*, 314 F.3d at 942 (describing complex system of federal regulation of banks and concluding that "this comprehensive statutory regime precludes the *Bivens* damages claims asserted"); *Nebraska Beef*, 398 F.3d at 1084 (relying on "stringent exhaustion requirement for grievances filed against USDA employees" in addition to availability of APA review); *Moore*, 113 F.3d at 992-93 (relying on comprehensive federal statute governing federal employment rights); *Miller*, 143 F.3d at 1416 (same).

C. The APA Does Not Preempt Respondent's *Bivens* Claim In This Case.

The Tenth Circuit's rejection of petitioners' *Bivens* preemption claim was, in any event, correct.

A *Bivens* remedy is foreclosed only when there are "special factors counseling hesitation in the absence of affirmative action by Congress," an "explicit statutory prohibition against the relief sought," or an "exclusive statutory alternative remedy." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (internal citation omitted). Petitioners rely on this last exception, arguing that "the remedial mechanism established by the APA . . . precluded respondent's *Bivens* claim." Pet. 18.

The court of appeals has already ruled that the APA precludes respondent's *Bivens* claim to the extent it is based on "constitutional violations committed while reaching a final agency decision." Pet. App. 81a. It is unclear at this stage how much of the predicate for respondent's Fifth Amendment claim falls within that description because petitioners declined to ask the district court to apply the Tenth Circuit's ruling at summary judgment. *See id.* at 26a. Petitioners nonetheless ask this Court to hold that they cannot be sued under *Bivens* even for violations "unrelated to final agency decisions appealable pursuant to the APA." *Id.* at 83a. Under petitioners' apparent view, individuals have no remedy at all for even the most egregious violations of their most basic constitutional rights whenever the defendants are employed by a federal agency subject to the APA. That unprecedented claim finds no support in the decisions of this or any other court.

Nothing in the APA indicates any congressional intent to immunize unconstitutional conduct undertaken by government officials "unrelated to any final agency action." Pet. App. 82a. Petitioners' assertion that "a *Bivens* action would be inconsistent with Congress's decision to shield non-final agency action from review under the APA," Pet. 19

(emphasis omitted), misses the mark. Petitioners' misconduct falls outside the APA because it is unrelated to agency action, not because it is non-final. And this Court has never held that a *Bivens* action is precluded simply because the officials violating the plaintiff's constitutional rights work for an administrative agency subject to the APA. The decisions in *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), did not so hold but turned instead on a careful examination of the detailed statutory scheme Congress has established *beyond* the APA for judicial review of claims by federal employees, *Bush*, 462 U.S. at 380-89, and social security claimants, *Schweiker*, 487 U.S. at 424-25. Petitioners point to no comparable system of review in this case. That Congress enacted a statute to provide a remedy to *other* plaintiffs for *different* kinds of violations does not "suggest[] that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Schweiker*, 487 U.S. at 423.

III. There Is No Basis For Review Of The Tenth Circuit's Fifth Amendment Ruling.

Finally, petitioners ask this Court to review the Tenth Circuit's fact-bound determination that their conduct violated respondent's Fifth Amendment right to exclude the Government from his property absent a proper taking with just compensation. That question, which petitioners acknowledge is not the subject of any circuit split, does not warrant review by this Court either.

A. Petitioners Do Not Assert Any Circuit Conflict Or Any Other Substantial Ground For Certiorari.

While petitioners complain at length that the decision below is wrong, they make only a half-hearted attempt to explain why that asserted error is worthy of this Court's review. Indeed, they acknowledge that there is no circuit split on the question, asserting instead that the decision below is

"the first" to address the question whether the Fifth Amendment prohibits government officials from attempting to coerce a waiver of Fifth Amendment rights. *See* Pet. 12, 25-26.

That petitioners can find no other decision addressing this question illustrates its unworthiness for review by this Court; petitioners can hardly claim that the decision below is of recurring importance when no other court has addressed the specific questions raised in this unusual case in the 215 years since the Fifth Amendment's ratification. The interlocutory posture of the appeal and the undeveloped factual record, *see supra* 12, make the case a particularly poor vehicle for resolving the scope of the Fifth Amendment's protections in any event.

B. The Decision Below Is Correct.

Faced with an unusual, perhaps unprecedented, campaign by government officials to evade the strictures of both their regulatory authority and the Fifth Amendment, the Tenth Circuit properly applied established legal principles in rejecting petitioners' claim of qualified immunity.

1. This Court has previously recognized, and petitioners concede, that the Fifth Amendment protects the foundational right of every citizen to exclude the Government from his property unless the Government actually takes the property through eminent domain and tenders the owner just compensation. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). The essence of respondent's claim is that petitioners attempted to evade this constitutional limitation on their authority in order to acquire his property by threat and extortion rather than through *bona fide* negotiations or eminent domain.

Petitioners' principal defense to that claim is that their attempt to evade the Fifth Amendment has, thus far, failed. Pet. 22-23. The Fifth Amendment, they say, will not be violated until they have succeeded in extorting property from

respondent without invoking eminent domain or paying just compensation. They therefore claim that respondent's "sole remedy under the Fifth Amendment is to seek just compensation under the Tucker Act, 18 U.S.C. 1491 (2006), once a taking has occurred." *Id.* at 23. This argument is baseless. If petitioners actually succeeded in coercing respondent into granting them an easement without compensation, the Government doubtless would argue that he has no claim under the Tucker Act because there was no taking. Thus, under petitioners' apparent view, the Constitution neither protects citizens from officials' attempts to extort their property, nor provides a remedy if the extortion is successful.

Unsurprisingly, there is no basis for this remarkable claim of constitutional inadequacy. The Fifth Amendment provides one, and only one, method for the coercive extraction of private property by the Government: eminent domain. Although that method entails the payment of just compensation – the neglect of which is subject to judicial remedy – it also necessarily precludes government officials from attempting to extract property through other coercive means. Thus, in *Kaiser Aetna* this Court held that the Fifth Amendment protected a private citizen from the Government's attempt to secure an easement outside the eminent domain process, even though the Government had not yet obtained the property right. In that case, the Army Corps of Engineers asserted that its right to regulate the navigable waters of the United States under the Rivers and Harbors Act included the power to require the defendants to grant a public easement on a private marina. 444 U.S. at 168-69. This Court rejected the Government's argument:

> [W]e hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the government cannot take without compensation . . . . Thus, if the Government wishes to make [private

> property] . . . into a public aquatic park . . . it may not, without invoking its eminent domain power and paying just compensation, require them to allow free [public] access . . . .

Id. at 179-180. Importantly, the Court did not hold, as petitioners now urge, that the Fifth Amendment had no application unless and until the Government succeeded in obtaining the easement. Instead, the Court allowed the landowner to assert the Fifth Amendment as a shield against the Government's attempt to coercively acquire an easement outside of the eminent domain process.

The Tenth Circuit's Fifth Amendment holding also draws support from "the well-settled doctrine of 'unconstitutional conditions.'" *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). Under that doctrine, "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.* Thus, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837-38 (1987), this Court held that the United States Coastal Commission could not condition a building permit on the developer granting a public access easement across his land because there was no "essential nexus" between the permit requested and the easement demanded. In the absence of such a nexus, the Government's demand for a citizen's property is "simply trying to obtain an easement through gimmickry, which convert[s] a valid regulation of land use into 'an out-and-out plan of extortion.'" *Dolan*, 512 U.S. at 387 (internal citations omitted).

The same is true here. The Constitution forbade petitioners from conditioning respondent's right to other government benefits (*e.g.*, grazing permits, road maintenance, etc.) on his waiver of his Fifth Amendment rights. The denial of those benefits had no relationship to the BLM's legitimate

regulatory interests relating to grazing, road maintenance, etc., and was nothing more than an "out-and-out plan of extortion." *Id.*

Finally, as the court of appeals noted, just as the Government may not condition governmental benefits on the waiver of constitutional rights, it may not go even further and affirmatively punish citizens for the exercise of their fundamental constitutional freedoms. It is true that unconstitutional retaliation has been recognized most frequently in the context of the right to petition for redress of grievances and the contexts of free speech and association.[11] But contrary to petitioners' assertion, neither the doctrine nor its rationale is limited to protecting First Amendment freedoms. This Court has recognized that, as a general matter, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1977). Thus, for example, the Constitution prohibits retaliating against a criminal defendant who successfully exercises his Due Process right to appeal his conviction by imposing a greater sentence upon reconviction, *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), or by re-indicting the defendant on more serious charges, *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974). In reaching these decisions, this Court has not relied on any principle specific to the protections of the First Amendment or the Due Process Clause. Rather, the Court has acted on the general principle that "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher*, 434 U.S.

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[11] *See, e.g., Burton v. Jones*, 321 F.3d 569 (6th Cir. 2003) (alleging retaliation for filing a lawsuit); *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990) (alleging retaliation for hiring an attorney); *Merritt v. Hawk*, 153 F. Supp 2d 1216 (D. Colo. 2001) (alleging retaliation for petitioning to improve conditions).

at 363 (citation omitted). *See also United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.") (internal citations omitted).

The court of appeals was thus correct in acknowledging in this case that citizens are protected from retaliation for the exercise of rights found under the Fifth Amendment as well:

> If we permit government officials to retaliate against citizens who chose to exercise this right, citizens will be less likely to exclude the government, and government officials will be more inclined to obtain private property by means outside the Takings Clause. The constitutional right to just compensation, in turn, would become meaningless. Because retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is meaningful.

Pet. App. 14a-15a.

2. Finally, although petitioners complain that the Tenth Circuit erred in finding respondent's constitutional rights clearly established in the context of this case, they fail to demonstrate why that fact-bound question is worthy of this Court's review. As demonstrated above, any reasonable official in petitioners' position would have understood that he could not evade the limitations of the Takings Clause, and punish a citizen's insistence on his Fifth Amendment rights, through a campaign of threats, harassment and retaliation. Indeed, petitioners do not seriously assert otherwise, but instead simply repeat their baseless claim that their conduct was nothing more than a proper "exercise of their lawful regulatory authority." Pet. 27.

IV. The Tenth Circuit's Decision Will Have No Impact On The Government's Legitimate Land Management Interests.

Unable to identify a significant division of authority on any of the legal questions decided by the court of appeals, or any other sound basis supporting review of this interlocutory decision, petitioners resort to predictions of dire consequences for the national government if review is denied. Pet. 28-29. Those speculations are without foundation and, in any case, do not provide a reason for review of the decision in this case at this time.

There is no question that the federal government owns much land in the West and interacts with private land owners on a regular basis. *Id.* But petitioners provide no reason to think that the Tenth Circuit's decision will interfere with that process in any way. The court of appeals went out of its way to state that it was *not* holding that routine implementation of the reciprocal right-of-way regulation would be illegal. Pet. App. 17a-18a. Moreover, petitioners have identified no other statute or regulation authorizing extortion as a means for obtaining easements outside the process of eminent domain. Nor do petitioners claim that such conduct is part of the BLM's ordinary practices or that prohibiting it would impair the agency's ability to fulfill its mission.

Indeed, petitioners themselves assure this Court that conflicts such as this one are very rare, noting that the "BLM has without incident negotiated thousands of such reciprocal rights-of-way across private lands intermingled with public lands." Pet. 28. This undoubtedly explains why petitioners are unable to cite even a single case arising under similar circumstances, much less demonstrate an entrenched division of authority among the courts of appeals on any of the questions raised in this case.

In any event, if petitioners' dire predictions do somehow come to pass, surely future cases with similar facts will arise and give this Court ample opportunity to address the

questions presented in this petition at that time. Waiting for a future case would also avoid the numerous jurisdictional and other prudential impediments to reaching the questions presented in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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